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No. 88-1790

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE NEMOURS FOUNDATION, GILBANE BUILDING COMPANY, AND THE AETNA CASUALTY & SURETY COMPANY,

Petitioners,

v.

PIERCE ASSOCIATES, INC. AND FEDERAL INSURANCE COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

This is a diversity case in which the Court of Appeals for the Third Circuit decided two issues of Delaware law in favor of Respondent Pierce Associates, Inc. and its surety, Federal Insurance Company,[1] and adversely to Petitioner The Nemours Foundation. The Court held that (1) Nemours was not an intended third party beneficiary of the subcontract between Petitioner Gilbane Building Company (Nemours' general contractor) and Pierce; and (2) Nemours could not maintain a cause of action in negligence against Pierce for the recovery of mere economic loss. These determinations were set forth in a cogent, well-reasoned opinion and constitute a correct application of Delaware law.

1. Pursuant to Supreme Court Rule 28.1, Respondents state that Federal Insurance Company is a wholly-owned subsidiary of the Chubb Corporation, whose stock is publicly traded. Pierce has no publicly traded parent, subsidiary or affiliate corporations.

This case does not involve any federal constitutional claim or any federal question, and the Court of Appeals' decision does not conflict with any decision by this Court or by a court of appeals from any other circuit. In sum, there exist no "special and important" reasons for granting a writ of certiorari in this case.

COUNTERSTATEMENT OF THE CASE

The construction project which is the subject of this litigation was plagued by serious delays and disputes over contract plans and specifications, design revisions, job progress schedules, progress payments, and change orders. (A7) In these disputes, general contractor Gilbane sided with its mechanical subcontractor Pierce and its numerous other subcontractors in asserting that responsibility for the delays and difficulties was attributable solely to Nemours (the project owner) and its architect and engineer. (A7-8).

On April 5, 1983, Gilbane filed a Complaint against Nemours and its architect and engineer seeking compensation for delay damages. On that same day, pursuant to its prior agreement with Gilbane, Pierce filed a breach of contract action against Gilbane (the only party with whom it was in privity) seeking compensation for delay damages and monies earned on the project but withheld by Nemours. These actions were consolidated with similar actions filed subsequently by other Gilbane subcontractors. Nemours counterclaimed against Gilbane, and also asserted claims directly against Pierce and the other subcontractors, alleging that it was a third-party beneficiary of Gilbane's subcontracts and was also entitled to recover in negligence for its economic loss.

During the first two years of the litigation, Gilbane continued to side with Pierce and the other subcontractors and against Nemours and its architect and engineer. Most importantly, Gilbane took positions on the third-party beneficiary and economic loss issues which are completely contrary to the positions it is now espousing in the Petition for Certiorari which it has filed jointly with Nemours and Aetna (Gilbane's surety) in this Court. Gilbane filed numerous

pleadings which unequivocally asserted that "Nemours is not a third-party beneficiary of the subcontract between Gilbane and Pierce".[2] Also, Gilbane filed a motion to dismiss Nemours' negligence counterclaim against it, arguing that under Delaware law "there exists no cause of action for mere economic loss arising out of tort or the alleged negligent breach of contract in the absence of property damage or personal injury". (Civil Action No. 83-195, Docket no. 89 at p. 4).[3]

In March, 1985, two months before the originally scheduled trial date and just before the scheduled depositions of Gilbane's key personnel, Nemours settled with Gilbane and they joined in asserting claims against Pierce. Gilbane received $4,025,000 from Nemours and its architect and engineer pursuant to this settlement, and subsequently paid out $3,669,000 of that sum to subcontractors other than Pierce to settle their delay claims. Gilbane retained $356,000 for itself. (A9) Significantly, the Nemours-Gilbane Settlement Agreement further provided that Gilbane would be entitled to share with Nemours on a 50-50 basis the first $8 million of any possible recovery against Pierce. (A9)[4] Subsequent to that settlement, the court realigned the parties to reflect Gilbane's sudden and drastic change in allegiance, designating Nemours and Gilbane as co-plaintiffs and Pierce and Federal as defendants. (A9) At trial, Gil-

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2. Civil Action No. 83-195, Docket nos. 33, 94, 166, and 259. Petitioner Aetna also filed pleadings asserting that Nemours was not a third-party beneficiary of the Gilbane-Pierce subcontract. Civil Action No. 83-195, Docket nos. 167 and 260.

3. During argument on this motion, Gilbane's counsel further contended that "in a wide spectrum of the law, from admiralty on the one hand all the way to products liability on the other, even the very liberal products liability area, if you have not alleged property damage or personal injury, you cannot sue in negligence for pure economic loss". (Civil Action No. 83-58, Docket no. 136 at p. 34).

4. In addition, Gilbane promised in the Settlement Agreement to cooperate with Nemours in its lawsuit against Pierce by forsaking any claim or defense based on Nemours' actions, to seek commitments from its other subcontractors to cooperate with Nemours in a similar fashion, and to refrain from settling with Pierce without Nemours' written consent. (A9)

bane's witnesses agreed with Nemours that Pierce was solely responsible for the delays and difficulties experienced on the project, notwithstanding Gilbane's long-maintained position prior to settlement that Nemours was responsible for those problems. The combined efforts of Nemours and Gilbane at trial resulted, not surprisingly, in a verdict in their favor and against Pierce.

On appeal, the Court of Appeals held, *inter alia*, that the jury verdict in favor of Nemours and against Pierce and Federal should be disallowed, because Nemours' third-party beneficiary and negligence claims were both deficient as a matter of Delaware law.[5] Nemours and Gilbane subsequently filed a Petition for Rehearing In Banc, but that Petition was denied. Not a single judge registered a dissent from the Court's denial of rehearing *in banc*.

Nemours' complaint that the Third Circuit's decision was unjust is fatuous. Nemours had an adequate remedy for recovery of its alleged damages, namely, pursuit of its claims against its general contractor, Gilbane. However, it made a tactical decision to settle those claims and collaborate with Gilbane, knowing that their combined efforts and resources would likely result in a substantial verdict against Pierce. Thus, Nemours voluntarily relinquished its sole legitimate means of securing redress for its alleged damages and, to the extent that it has not been made whole for those alleged damages, its injury was entirely self-inflicted.

REASONS FOR DENYING THE WRIT

A. THIS CASE ONLY INVOLVES ISSUES OF STATE LAW.

This diversity case only involves two issues of Delaware law, and the Third Circuit correctly followed the

5. The decision with respect to the negligence claim was unanimous; Judge Sloviter dissented from the Court's opinion only on the third-party beneficiary issue. Judge Sloviter stated that she nevertheless would have vacated the jury's verdict on account of the trial court's legally erroneous decision to preclude Pierce's President from testifying as an expert witness because of his pecuniary interest in the outcome. (A41-43) The majority had found this evidentiary ruling "troublesome" (A24), but did not decide that issue in light of its holding that Nemours' claims were legally deficient.

teaching of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), in applying Delaware law on those two issues. Thus, there are no "special and important reasons" for granting certiorari here. As this Court has repeatedly and consistently declared, "We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law". *Bowen v. Massachusetts*, U.S. , 108 S.Ct. 2722, 2739 (1988). *Accord Sheridan v. United States*, U.S. , 108 S.Ct. 2449, 2455 (1988); *Haring v. Prosise*, 462 U.S. 306, 314 n. 8 (1983) ("a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review. See this Court's Rule 17."); *Butner v. United States*, 440 U.S. 48, 58 (1979); *Cort v. Ash*, 422 U.S. 66, 73 n. 6 (1975); *Pierson v. Ray*, 386 U.S. 547, 558 n. 12 (1967); *Commissioner v. Estate of Bosch*, 387 U.S. 456, 462 (1967); *Richards v. United States*, 369 U.S. 1, 16 n. 35 (1962); *The Tungus v. Skovgaard*, 358 U.S. 588, 596 (1959); *Allegheny County v. Mashuda Co.*, 360 U.S. 185, 191 (1959); *General Box Co. v. United States*, 351 U.S. 159, 165 (1956); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949).

As discussed more fully below, the Third Circuit's decision on the third-party beneficiary and economic loss issues represented a correct application of Delaware law. Thus, there is no reason to depart here from this Court's "settled and firm policy" of declining to review courts of appeals' determinations of state law. *Bowen v. Massachusetts, supra.*[6]

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6. As noted by Petitioners (Petition at 6 n.1), in a case filed by Nemours against a different subcontractor subsequent to the Third Circuit's denial of rehearing *in banc* in this case, the Delaware district court certified to Delaware's Supreme Court on May 2, 1989 the same two issues of state law previously decided against Nemours by the Third Circuit. *Nemours v. Manganaro Corp.*, C.A. 89-138. On May 31, 1989, the Third Circuit dismissed Manganaro's appeal from that decision as premature and also denied a Petition for Mandamus filed by Pierce in its capacity as *amicus curiae*. Nos. 89-3305, 3306. The Delaware Supreme Court has not yet decided whether to grant certification in the *Manganaro* case. In any event, the certification proceeding in that case in no way requires a deviation from this Court's "settled and firm policy" of refusing to grant certiorari in cases involving only issues of state law.

B. THE THIRD CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION BY THIS COURT OR BY A COURT OF APPEALS FROM ANY OTHER CIRCUIT.

Recognizing this Court's longstanding practice of refusing to grant certiorari in cases which only involve issues of state law, Petitioners attempt to camouflage their request for review of state law claims by arguing that this case presents the "ideal vehicle" for this Court to eliminate the "confusion" and "uncertainty" which they claim now prevail in the courts of appeals concerning the proper application of state law in diversity cases. They attribute this purported "confusion" and "uncertainty" in the courts of appeals to this Court's "lack of guidance" (Petition at 6-7), "mixed messages" (*Id.* at 14), "uneven direction" and "lack of direction" (*Id.* at 16, 17, 20 and 21), and "seemingly contradictory decisions" (*Id.* at 17) concerning the proper means of applying state law in a diversity case. However, Petitioners' claims of "confusion" and inter-circuit "conflict" are made up out of whole cloth.

Petitioners' repeated string-citations to a plethora of decisions by the courts of appeals cannot mask their failure to cite *any* decision by this Court or by a court of appeals from another circuit which conflicts with the Third Circuit's decision in this case. They have not cited *any* opinion by a member of this Court (either on behalf of the Court, in dissent or in concurrence) referring to the supposed "confusion" which Petitioners claim now reigns in the courts of appeals with respect to the determination of state law in diversity cases. Nor have they cited *any* decision by any court of appeals complaining of inadequate guidance from this Court concerning the proper means of applying state law.

In reality, the courts of appeals are *not* "hopelessly confused and inconsistent" (Petition at 14) in making their determinations of state law in diversity cases, as this Court has provided clear and consistent direction on how they should perform that task. Indeed, the long passage of time since this Court last deemed it necessary to address that

issue is testament to the fact that the courts of appeals have been determining state law in a manner consistent with one another and with the direction this Court provided in *Erie* and its progeny. There is simply no need at this time for this Court to re-visit the well-settled issue of how federal courts sitting in diversity should determine state law. Moreover, this case would hardly provide the "ideal vehicle" for such a review, as claimed by Petitioners (Petition at 2), because the Third Circuit's decision conforms fully to the teachings of this Court and the holdings of Delaware's courts.

C. THE THIRD CIRCUIT WAS NOT OBLIGATED TO ACCEPT THE DISTRICT COURT'S STATE LAW RULINGS.

The primary argument made in the Petition for Certiorari is that the Third Circuit failed to accord sufficient deference to the decisions made by the three district court judges who rendered decisions on the third-party beneficiary and economic loss issues at various stages of the litigation. However, the Court of Appeals did give the district court's rulings the weight they deserved, and in any event Petitioners' argument is insufficient to warrant the granting of certiorari by this Court.

As a threshold matter, it bears emphasis that Petitioners' briefs on the merits in the Third Circuit did not raise the deference argument they are now pressing in this Court. Quite to the contrary, Nemours' Brief affirmatively stated, with respect to both the third-party beneficiary and economic loss issues, that *"[t]he standard of review for this issue is plenary"*. (Brief for Nemours filed June 24, 1988 at pp. 1, 14-15) (emphasis added)[7] This Court's "normal practice" is to "refrain from addressing issues not raised in the Court of Appeals". *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). *Accord Hoover v. Ronwin*, 466 U.S. 558, 574 n. 25 (1984) (refusing to consider argu-

7. Petitioners did not raise the deference argument until their January 18, 1989 Petition for Rehearing In Banc, which obviously came after the Third Circuit had already ruled against them.

ment first raised in response to motion for rehearing in court of appeals). Petitioners' failure to raise their deference argument in a timely manner in the Court of Appeals should preclude its consideration in this Court.

In addition, the Petition for Certiorari intentionally obscures the fact that neither of the two district judges who decided the third-party beneficiary issue rendered an opinion explaining his decision, and only one of the three district judges who decided the economic loss issue prepared an opinion in support of his ruling.

Judge Latchum (the first judge assigned to the case) decided the third-party beneficiary and economic loss issues in an "Omnibus Order" relating to sixteen different motions filed by five different parties, and he rendered his decisions as mere *ipse dixits* without an accompanying opinion, citation of *any* caselaw or reference to *any* of the provisions of the voluminous Gilbane-Pierce subcontract. (A47-48).

One year later, in March, 1985, Judge Stapleton did render an opinion on the economic loss issue in which he predicted that the Delaware Supreme Court would probably allow the maintenance of a negligence action to recover economic loss. (A61-67)[8] Judge Stapleton's opinion was in fact carefully considered by the Third Circuit (*See* A19-22), but it disagreed with his prediction of how the Delaware Supreme Court would decide the economic loss issue, correctly noting that there had been "significant developments in the law" on that issue during the 3½ years which had elapsed subsequent to the time of his prediction, particu-

8. It is noteworthy that although Judge Latchum's "Omnibus Order" of the prior year had already decided, *inter alia*, the economic loss issue, Judge Stapleton did not deem himself required to accord any deference to that unexplained ruling. Indeed, *nowhere* in his opinion did he even make any reference to it. Contrary to Petitioners' claim that they relied upon the rulings by both Judges Latchum and Stapleton in determining to settle with one another (Petition at 4), Judge Stapleton's opinion was rendered several weeks *after* Petitioners had already executed their Settlement Agreement. Also, Judge Stapleton only decided the economic loss issue; he was not asked to decide whether Nemours could maintain a third-party beneficiary claim against Pierce.

larly this Court's unanimous decision in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986).

Finally, Judge Farnan decided the third-party beneficiary and economic loss issues in the context of Pierce's motion for a directed verdict, which he summarily denied from the bench by stating simply that he would follow Judge Latchum's Omnibus Order on those two issues as well as Judge Stapleton's opinion on the economic loss issue. (A75) Once again, there was no opinion rendered, no citations to *any* caselaw, and no discussion of *any* provisions in the Gilbane-Pierce subcontract.

Thus, with respect to the third-party beneficiary issue, *none* of the district judges ever rendered an opinion or even discussed *any* of the provisions of the Gilbane-Pierce subcontract. Under such circumstances, it cannot reasonably be contended that the Third Circuit was obligated to accept the district court's rulings on the third-party beneficiary issue.[9] Indeed, even though Judge Sloviter dissented from the Court's decision on that issue, she did not criticize the

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9. *See, e.g., Besta v. Beneficial Loan Co.*, 855 F.2d 532, 533-4 (8th Cir. 1988) ("When reviewing an interpretation of state law by a resident federal judge, however, we accord substantial deference to the interpretation unless we believe it does not correctly apply local law, or unless the judge has not expressed adequate reasons for the ruling on the state law question. Here, the judge did not supply us with his reasoning on what we believe to be the relevant question. We, therefore, believe that our deference must yield to reasoning we find more compelling."); *Dean v. Dean*, 821 F.2d 279, 283 n. 4 (5th Cir. 1987) ("Any deference to the district court is also less where the court fails to set out any analysis in predicting how the state's highest court would rule on a novel question of state law or if the interpretation of the state law is deficient in analysis or otherwise lacking in reasoned authority."); *Weiss v. United States*, 787 F.2d 518, 525 (10th Cir. 1986) ("When a district court fails to set out its analysis in predicting how the state's highest court would rule on a novel question of state law, we need not defer to the district court."); *Rabon v. Guardsmark, Inc.* 571 F.2d 1277, 1279 n. 1 (4th Cir. 1978), *cert. denied*, 439 U.S. 866 (1978) ("The district court decided the [state law] issue of liability in an oral opinion. It gives us little aid in deciding this appeal. It contains no citation of authority . . . While we normally accord significant weight to a district judge's interpretation of the law of the state in which he sits . . . we cannot do so under the circumstances described.").

majority for failing to accord sufficient deference to the district court's unexplained rulings.

With respect to the economic loss issue, only Judge Stapleton had rendered an opinion, and the Third Circuit did give due consideration to that opinion. (A19-22) However, subsequent developments in the law properly led the Court of Appeals to conclude that the Delaware Supreme Court would decide that issue differently than he had predicted. The Third Circuit accorded deference to Judge Stapleton's prediction, but was certainly not bound by it. As Justice Frankfurter stated in his concurring opinion in *Bernhardt v. Polygraphic Company of America*, 350 U.S. 198, 209 (1956), "[t]he defendant is entitled to have the view of the Court of Appeals on Vermont law and cannot, under the Act of Congress, be foreclosed by the District Court's interpretation."[10]

Thus, it is manifest that the Third Circuit's disagreement with the district court's rulings on the third-party beneficiary and economic loss issues does not warrant review by this Court.

D. THE THIRD CIRCUIT DETERMINED THE STATE LAW ISSUES CORRECTLY.

1. The Third-Party Beneficiary Issue.

Remarkably, *nowhere* in their Petition for Certiorari do the Petitioners make *any* reference to the provision incorporated into the Gilbane-Pierce subcontract upon which the Third Circuit principally relied in determining that Nemours was not an intended third-party beneficiary of

10. *Accord Ward v. Hobart Manufacturing Co.*, 450 F.2d 1176, 1180 n. 5 (5th Cir. 1971):

> We accord proper consideration to the 'rational divination' of the district court to determine what decision the Mississippi Supreme Court would reach if and when the question here presented is resolved by that court. Nevertheless, we cannot adopt the district court's view of the applicable state law if in our judgment that view is contrary to the more cogent reasoning of the best and most wide-spread authority. Otherwise appellate review in a substantial number of diversity cases which come before this court would be effectively eliminated.

that subcontract. That provision, which is Article 1.1.2 of the American Institute of Architects' "General Conditions of the Contract of Construction" (1976 ed.) (the "AIA General Conditions"), makes it pellucidly clear that Gilbane and Pierce expressly *disavowed* any intent to confer third-party beneficiary status upon Nemours:

> Nothing contained in the Contract Documents shall create any contractual relationship between the Owner [Nemours] or the Architect and any Subcontractor [Pierce] or Sub-subcontractor. (A14)

The Third Circuit correctly recognized that, under Delaware law, "[t]he intent to confer a third party beneficiary benefit is to be determined from the language of the contract. *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 336 A.2d 211, 215 (Del. 1975); *Royal Indemnity Co. v. Alexander Industries, Inc.*, 8 Storey 548, 58 Del. 548, 211 A.2d 919, 920 (1965)". (A10) After carefully analyzing Article 1.1.2 of the AIA General Conditions and numerous other similar provisions of the subcontract, the Third Circuit properly concluded that "the subcontract does not manifest an intent by Pierce and Gilbane to confer third party beneficiary status upon Nemours. *In fact, the subcontract evidences an intent to preclude such a status*". *(A18) (emphasis added)*[11]

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11. In addition to Article 1.1.2, the Court cited many other provisions incorporated into the subcontract which demonstrated that "Gilbane and Pierce contemplated that Pierce was to be obligated to Gilbane, not to Nemours". (A13) These provisions stated as follows: "The *Subcontractor* [Pierce] agrees to be bound to the *Contractor* [Gilbane] by the terms and conditions of the Agreement . . . and to assume toward the *Contractor* all the obligations and responsibilities that the *Contractor*, by these documents, assumes toward the *Owner* [Nemours]". (emphasis in original) (A13); "The *Contractor* shall have *sole* and *total responsibility* for completing the [general] contract . . . and is responsible to the *Owner* for the full, proper, and timely performance of all work under the contract". (emphasis in original) (A14); "The *Contractor* shall be responsible to the *Owner* for the acts and omissions of his employees, *Subcontractors* and their agents and employees . . ." (emphasis in original) (A14); "Section 7(f) of the subcontract provides that if Pierce fails to perform, Gilbane may provide labor, equipment or materials or may terminate Pierce and complete the work itself. Section 38E of the Special conditions provides that the *subcontractor's* payment and performance bond shall name *Gilbane* as obligee". (emphasis in original) (A13-14)

As the Third Circuit correctly stated, no Delaware court has ever construed the meaning of Article 1.1.2 of the AIA General Conditions which is quoted above. (A15) However, the Court pointed out that there are a number of decisions from other jurisdictions which have construed that provision, and those decisions *uniformly* hold that it "prevents an owner from maintaining a breach of contract action against a subcontractor on a third party beneficiary theory, or prevents a subcontractor from maintaining a breach of contract action against an owner on such a theory". (A15) *See, e.g., E.C. Ernst, Inc. v. Manhattan Constr. Co. of Texas*, 551 F.2d 1026, 1030-1, 1042 (5th Cir. 1977), *cert. denied*, 434 U.S. 1067 (1978); *Honey v. George Hyman Construction Co.*, 63 F.R.D. 443, 450 (D.D.C. 1974); *Federal Mogul Corp. v. Universal Constr. Co.*, 376 So.2d 716, 724 (Ala. Civ. App. 1979), *cert. denied*, 376 So.2d 726 (Ala. 1979); *G & P Electric Co. v. Dumont Construction Co.*, 194 Cal. App.2d 868, 15 Cal. Rptr. 757, 761-3 (1961); *Delta Electric, Inc. v. Ingram and Greene, Inc.*, 123 App.Div.2d 369, 506 N.Y.S.2d 594 (1986).

Petitioners' argument that the decision in *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 336 A.2d 211 (Del. 1975), was improperly "disregarded" by the Third Circuit is completely spurious. The Third Circuit gave careful consideration to the *Cannon* decision (*See* A10, A12, A17), and correctly determined that *Cannon* was not controlling in this case because the subcontract at issue there, unlike the Gilbane-Pierce subcontract, did not contain any provisions which *expressly renounced* an intent to confer third-party beneficiary status upon the owner. Equally erroneous is Petitioners' argument that the Third Circuit improperly based its decision on factors external to the subcontract. As stated above, the Third Circuit carefully analyzed numerous provisions of the Gilbane-Pierce subcontract (including the provisions relied upon by Petitioners), and based its decision solely on the express language of that subcontract. (*See* A5-6, A13-15)

Accordingly, the Third Circuit's decision on the third-party beneficiary issue is fully consistent with applicable Delaware law.[12]

2. The Economic Loss Issue.

The Third Circuit's decision that Nemours could not maintain a negligence action against Pierce for the recovery of mere economic loss also represents a proper determination of Delaware law pursuant to this Court's mandate in *Erie*.

As Petitioners concede, the Delaware Supreme Court has never addressed the economic loss issue, and therefore they cannot claim that the Third Circuit's decision is contrary to any controlling Delaware Supreme Court decision. There has been only one Delaware lower court decision which has addressed the economic loss question, and in that case Judge Andrew Christie (now Chief Justice of Delaware's Supreme Court) squarely held, on facts nearly identical to the instant case, that an owner which was not in privity with a subcontractor could not sue the subcontractor in negligence to recover mere economic loss. *Crowell Corp. v. Topkis Construction Co.*, 280 A.2d 730 (Del. Super. 1971).

The Third Circuit properly recognized that it was not bound by the *Crowell* decision (A20), but predicted that the Delaware Supreme Court would, if the issue were raised before it, reaffirm the *Crowell* ruling as Delaware law. (A22-23)[13] This prediction was not inconsistent with the Delaware Supreme Court's decisions in *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 336 A.2d 211 (Del. 1975) or

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12. As noted previously (p. 3, n. 2, *supra*), that decision is also in accordance with the position which Petitioners Gilbane and Aetna repeatedly and consistently asserted in the district court during the two years of litigation preceding their settlement with Nemours.

13. Notwithstanding Petitioners' criticism of *Crowell* as "outdated", it bears reiteration that Petitioner Gilbane vigorously argued in the district court that Delaware does not allow the maintenance of a negligence action for the recovery of mere economic loss. *See* p. 3, *supra*.

Seiler v. Levitz Furniture Co., 367 A.2d 999 (Del. 1976) because, as the Third Circuit correctly pointed out, both of those cases involved "(i) property damage, not merely economic loss and (ii) privity of contract between the injured party and the wrongdoer". (A21, A22).

As discussed above (p. 8, *supra*), Judge Stapleton had predicted in March, 1985 that the Delaware Supreme Court would not follow the *Crowell* decision. However, the Third Circuit disagreed with that prediction, finding that "[r]ecent developments in the law suggest a trend to preclude the maintenance of a negligence action to recover purely economic loss". (A21) The primary catalyst for that recent trend was this Court's unanimous decision in *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858 (1986), where the Court held in the admiralty context that purely economic loss was recoverable only in contract, not in tort. Even though *East River* was an admiralty case, its cogent reasoning has been widely followed by courts in numerous other areas of the law, including construction litigation. The vast majority of jurisdictions now hold that the economic loss rule applies in construction disputes.[14]

Judge Stapleton's March, 1985 prediction preceded the decisions in *East River* and its progeny, which reflect a strong and growing trend in the law to preclude the maintenance

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14. *See, e.g., Morse/Diesel, Inc. v. Trinity Industries, Inc.*, 859 F.2d 242 (2d Cir. 1988); *Bagwell Coatings, Inc. v. Middle South Energy, Inc.*, 797 F.2d 1298, 1309-12 (5th Cir. 1986); *Bryant Elec. Co., Inc. v. City of Fredericksburg*, 762 F.2d 1192 (4th Cir. 1985); *Chicago Heights Venture v. Dynamit Nobel of America*, 782 F.2d 723, 726-9 (7th Cir. 1986); *Blake Construction Co., Inc. v. Alley*, 233 Va. 31, 353 S.E. 2d 724 (1987); *Anderson Electric, Inc. v. Ledbetter Erection Corp.*, 115 Ill.2d 146, 503 N.E.2d 246 (1987); *Stuart v. Coldwell Banker Comm. Group*, 745 P.2d 1284, 1290-2 (Wash. 1987); *Tusch Enterprises v. Coffin*, 740 P.2d 1022, 1025-6 (Idaho 1987); *Ellis v. Robert C. Morris, Inc.*, 513 A.2d 951 (N.H. 1986); *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617 (Tex. 1986); *Minneapolis Society of Fine Arts v. Parker-Klein Associates Architects, Inc.*, 354 N.W.2d 816 (Minn. 1984); *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124, 126-9 (Iowa 1984); *State for Use of Smith v. Tyonek Timber, Inc.*, 680 P.2d 1148 (Alaska 1984).

of negligence claims for purely economic loss.[15] The Third Circuit's disagreement with Judge Stapleton and its prediction that the Delaware Supreme Court would follow the decisions in *East River* and *Crowell* and disallow the maintenance of a negligence claim for mere economic loss were eminently reasonable and are not worthy of review by this Court.

CONCLUSION

This case presents only issues of state law which were decided in complete conformity with this Court's teaching in *Erie* and with the applicable decisions of Delaware's state courts. The Third Circuit's decision does not conflict with any decision by this Court or by a court of appeals from another circuit, and thus there exist no "special and important" reasons for granting certiorari in this case. The Petition for Certiorari should be denied.

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15. Indeed, Judge Stapleton subsequently authored an opinion for the Court of Appeals which disallowed a jury verdict where the plaintiff had recovered in negligence for his purely economic loss. *King v. Hilton-Davis*, 855 F.2d 1047 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 839 (1989). In that decision, Judge Stapleton acknowledged that his opinion for the Court was contrary to a decision reached on identical facts by Montana's Supreme Court in 1984, but he emphasized that that Court "did not have the benefit of the analysis of the Supreme Court in *East River*". 855 F.2d at 1052 n. 3. Similarly, in the instant case, Judge Stapleton "did not have the benefit of the analysis" of *East River* when he ventured his March, 1985 prediction.

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No. 88-1790

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

THE NEMOURS FOUNDATION, GILBANE BUILDING COMPANY, AND THE AETNA CASUALTY & SURETY COMPANY,

Petitioners,

v.

PIERCE ASSOCIATES, INC. AND FEDERAL INSURANCE CO.,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Either Pierce Associates and Federal Insurance Co. do not understand the contentions raised in the petition for certiorari, or they are intentionally obfuscating those issues in an effort to mislead this Court.

The issue before this Court is *not* whether an owner can sue a subcontractor on a third party beneficiary basis in Delaware, or whether an owner may recover in tort in Delaware for economic damages, although we believe the answer to both those questions is in the affirmative. Rather, the issue is whether in a diversity case governed by Delaware law, a court of appeals may disregard the interpretation of substantive state law by the highest court of that state as well as

similar interpretations of that substantive law by three experienced federal district court judges sitting in Delaware, and, through a process referred to as "predicting" the state substantive law, establish what amounts to federal common law—a result squarely prohibited by *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

SIGNIFICANT PROCEDURAL DEVELOPMENTS HAVE OCCURRED SINCE THE FILING OF THE PETITION FOR A WRIT OF CERTIORARI

The foregoing analysis, itself, would represent a cogent basis for the grant of certiorari. As respondents note, however, *Brief in Opposition to Petition* at 5 n.6, a further significant ground has emerged since the petition for certiorari was filed.

The day before the petition was filed, but in a separate action based on the same substantive issues, the Delaware district court, seeking a firm and unarguable resolution, entered an order certifying two questions identical to the underlying state law questions in this case to the Delaware Supreme Court under Rule 41 of the Delaware Supreme Court.[1] *Nemours v. Manganaro*, No. 89-00138 (D. Del. May 2, 1989) ("*Manganaro I*"). The Certificate of Questions of Law was transmitted to the Delaware Supreme Court by letter dated May 8, 1989.

Respondents and Manganaro have done everything possible to frustrate the certification procedure. In its certification order, the district court permitted Pierce to participate as

1. Rule 41 states that the United States District Court for the District of Delaware can "certify to [the Delaware Supreme] Court . . . a question of law arising in any case before it prior to the entry of final judgment if there is an important and urgent reason for an immediate determination of such question by this Court." Delaware Supreme Court Rule 41.

amicus curiae in the *Manganaro* case. Pierce and Federal subsequently used that status to interfere repeatedly with the certification proceedings ordered in *Manganaro I*. On the same day the district court sent the Certificate to the Delaware Supreme Court, Pierce and Federal filed a petition for writ of mandamus in the United States Court of Appeals for the Third Circuit, requesting that court to vacate the Delaware district court's certification order in *Manganaro I*. Simultaneously, Manganaro filed a notice of appeal from the same order of the district court. Both Pierce and Manganaro petitioned the court of appeals to stay the certification proceedings.

Pierce and Federal also sought to have the Delaware district court withdraw its Certificate. In addition, Pierce and Federal have cooperated with Manganaro to barrage the Delaware Supreme Court with unsolicited motions and memoranda of law despite the provision of Delaware Supreme Court Rule 41 that "[a]fter docketing and unless otherwise ordered, this Court shall thereupon and *without further argument* determine whether to accept or refuse the certification" (emphasis added).[2]

The district court rejected the effort of Pierce and Federal, and the Court of Appeals for the Third Circuit has now dismissed the petition for mandamus, as well as the appeal, *Nemours v. Manganaro*, ___ F.2d ___, No. 89-3305, slip op. at 4 (3d Cir. May 26, 1989) ("*Manganaro II*"), and the

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2. On May 10, 1989, Pierce filed a motion for leave to file a memorandum on issues of law relating to the Certificate. The next day, Manganaro filed a similar motion. On June 6, Pierce moved yet again for leave to file an additional memorandum of law with the Delaware Supreme Court.

Indeed, the length respondents have been willing to go to prevent the highest court of Delaware from determining its own law is remarkable. This persistent attempt to prevent the Delaware Supreme Court from declaring the "truth"—i.e., the answers to the underlying Delaware state law questions presented here—is highly questionable conduct.

related stay petitions, thus making it possible for the highest court of Delaware to decide definitively the two substantive issues governing the outcome of this case, as contemplated by this Court's decision in *Erie*.

THE PETITION RAISES SUBSTANTIAL QUESTIONS OF FEDERALISM PURSUANT TO *ERIE RAILROAD v. TOMPKINS*

The thrust of the arguments raised by Pierce and Federal in opposition to the petition for certiorari is that this Court should defer to the state law determinations made by the 2-1 panel of the court of appeals because the court of appeals is more intimately involved with the law of the states in its circuit than is the United States Supreme Court. *Brief in Opposition to Petition* at 5.[3] Taken to its logical conclusion, respondents' argument supports the force of Nemours' position, not its own.

Just as the court of appeals may be in a better position to determine the law of the states in its circuit than is the Supreme Court, so the district court is in a better position to determine the law of the state in which it sits than is the court of appeals. The legal principle is one of federalism, which encompasses deference to that court most familiar with state

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3. Respondents also assert that Nemours' failure to press its deference argument before the court of appeals panel precludes its consideration at this time. *Brief in Opposition to Petition* at 7-8. This latter contention is clearly fallacious. Nemours could not possibly have argued that the panel erred in not according deference to the Delaware district court's state law determinations prior to the time that the panel did, in fact, refuse to defer. It was not until the court of appeals rejected the considered opinions of the three Delaware district court judges that the deference contention became relevant; at that point Nemours immediately proceeded to argue it strenuously. *See Petition of The Nemours Foundation and Gilbane Building Company for Rehearing and Suggestion of Rehearing In Banc* at 5-7.

law, not, as respondents suggest, deference to the courts of appeals *per se*. *See United States v. Hohri*, ___ U.S. ___, 107 S. Ct. 2246, 2253 n.6 (1987); *Bernhardt v. Polygraphic Company of America, Inc.*, 350 U.S. 198, 204 (1955).[4] It would be anomalous indeed if, as respondents argue, the principle of deference ended with the courts of appeals rather than extending to the district courts and the state courts themselves that are far more knowledgeable of the state law issues at hand.

This case presents a striking example of the importance of deferring out of federalism principles to that court closest to the state whose law is at issue. Here, three Delaware district court judges independently arrived at identical state law determinations on three separate occasions. The panel of the court of appeals that reversed the district court's state law determinations consisted of a New Jersey district court judge sitting by designation, who wrote the majority opinion; a judge newly-appointed to the court of appeals from the Pennsylvania state courts, who joined it; and an experienced court of appeals judge, who dissented on the central issue. Given the circumstances, it would be ironic indeed for this Court to defer to the state law determinations of the court of appeals, when the court of appeals itself completely disregarded the state law determinations of the district court and the highest court of Delaware.

The Third Circuit itself has recognized the importance of the state law questions that the panel had answered contrary to the determinations made by the Delaware district court

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4. The authorities upon which respondents rely do not distinguish between deference to the court of appeals and deference to the district court, but state the proposition broadly. *See, e.g., Bowen v. Massachusetts*, ___ U.S. ___, 108 S. Ct. 2722, 2739 (1988); *Sheridan v. United States*, ___ U.S. ___, 108 S. Ct. 2449, 2455 (1988); *Cort v. Ash*, 422 U.S. 66, 73 n.6 (1975); *see also Frisby v. Schultz*, ___ U.S. ___, 108 S. Ct. 2495, 2500 (1988); *Bishop v. Wood*, 426 U.S. 341, 345 (1975); *MacGregor v. State Mutual Life Assurance Co.*, 315 U.S. 280, 281 (1942) (*per curiam*).

judges. In dismissing Manganaro's appeal, it observed that the status of Delaware law on these issues is "probably the determinative legal issue in the underlying merits," *Manganaro II*, slip. op. at 5, and thus found that the certification order did not meet the second "separate from the merits" prong of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), so as to justify interlocutory review.

Plainly, the state law questions presented for review here, if answered definitively by the Delaware Supreme Court in *Manganaro I*, will dispose of any lingering uncertainties over the very heart of this case created by the court of appeals panel's abrupt reversal of three Delaware district judges on questions of Delaware state law. When the highest court of a state stands poised to determine definitively the very questions of state law about which the federal courts below have so sharply disagreed, we respectfully suggest that this Court should permit that process to unfold.

CONCLUSION

Contrary to respondents' arguments, the decision of the Court of Appeals for the Third Circuit poses multiple issues of federalism under *Erie* deserving of the Court's attention and merits review by this Court even if the Delaware Supreme Court were to deny certification. At the very least, however, the Court should defer consideration of the petition for writ of certiorari pending the outcome of the certification procedure in the Delaware Supreme Court. Should the Delaware Supreme Court grant certification and determine Delaware law contrary to the findings of the court of appeals, this Court then could grant the writ of certiorari and simply remand this case to the court of appeals for appropriate disposition in light of the Delaware Supreme Court's ruling. This is the clear command of *Erie*, namely, that in a diversity action the applicable law of the state must govern.

Were this Court to deny certiorari at this time, it is quite possible that a definite ruling of the Delaware Supreme Court on the underlying issues of Delaware law governing the present dispute would be of no consequence, thus defeating the very purpose of *Erie*, and repudiating the principle of federalism that is mandated by the United States Constitution.

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